

Mailed 4/28/2000

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IN THE MATTER OF:          *
                           *
Donald A. Knowlton         *
    Claimant               *
                           *   Case No.: 1999-LHC-2400
    Against               *
                           *   OWCP No.: 1-145226
Electric Boat Corporation  *
    Employer/Self-Insurer *
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APPEARANCES:

Scott N. Roberts, Esq.
For the Claimant

Lance G. Proctor, Esq.
For the Employer/Self-Insurer

BEFORE: **DAVID W. DI NARDI**
Administrative Law Judge

DECISION AND ORDER - AWARDING BENEFITS

This is a claim for worker's compensation benefits under the Longshore and Harbor Workers' Compensation Act, as amended (33 U.S.C. §901, **et seq.**), herein referred to as the "Act." The hearing was held on January 25, 2000 in New London, Connecticut, at which time all parties were given the opportunity to present evidence and oral arguments. The following references will be used: TR for the official hearing transcript, ALJ EX for an exhibit offered by this Administrative Law Judge, CX for a Claimant's exhibit and RX for an exhibit offered by the Employer. This decision is being rendered after having given full consideration to the entire record.

Post-hearing evidence has been admitted as:

Exhibit No.	Item	Filing Date
RX 5	Claimant's personnel records	01/28/00
RX 6	1/24/00 report of Dr. William A. Wainright	01/28/00
CX 6	Attorney Roberts' status letter	02/07/00
RX 7	Attorney Proctor's status letter, as well as the	02/25/00
RX 8	Notice of Taking Deposition of Dr. Wainright	02/25/00
CX 7	Attorney Roberts' objection to deposition	02/24/00
ALJ EX 7	This Court's ORDER relating to said deposition	03/01/00
RX 9	Attorney Proctor's letter filing the	03/10/00
RX 10	02/29/00 deposition testimony of Dr. Wainright	03/10/00
CX 8	Claimant's Motion to Object to said deposition ¹	03/20/00
CX 9	Claimant's Motion to Admit Additional Evidence	03/20/00
CX 10	11/01/99 deposition testimony of Dr. Wainright in Franco v. Electric Boat Corp , OWCP No. 1-143944	03/20/00
CX 11	08/02/99 deposition testimony of Dr. Wainright in Carson v. Electric Boat Corp. , OWCP No. 1-143642	03/20/00

The record was closed on March 20, 2000, as no further documents were filed.

¹Claimant's objections are overruled as the testimony is relevant and material herein and the objections really go to the weight to be accorded to the doctor's opinions.

Stipulations and Issues

The parties stipulate, and I find:

1. The Act applies to this proceeding.
2. Claimant and the Employer were in an employee-employer relationship at the relevant times.
3. Claimant suffered an injury prior to 10/8/98 in the course and scope of his maritime employment.
4. Claimant gave the Employer notice of the injury in a timely manner.
5. Claimant filed a timely claim for compensation and the Employer filed a timely notice of controversion.
6. The parties attended an informal conference on 6/30/99.
7. The applicable average weekly wage is \$954.48.
8. The Employer just prior to the hearing agreed to pay permanent partial compensation from 5/31/99 through 1/20/00, for a total of \$22,907.52 at the weekly rate of \$636.32. Medical benefits thus for total \$1,926.04. (RX 4; TR 7-8). Employer's counsel, by letter dated February 17, 2000 (RX 7), has advised that Claimant "has been paid retroactive benefits to May 13 (sic), 1999, the date of Dr. Browning's rating. The payments are being made on an ongoing basis pending the resolution of this matter."
9. The Employer concedes that Claimant's bilateral hand/arms vibration syndrom (HAVS) constitutes a work-related injury. (TR 6).

The unresolved issues in this proceeding are:

1. The nature and extent of Claimant's disability.
2. The date of his maximum medical improvement.

Summary of the Evidence

Donald A. Knowlton ("Claimant" herein) fifty-five (55) years of age and with an employment history of manual labor, began working in 1967 as a pipefitter at the Groton, Connecticut shipyard of the Electric Boat Company, then a division of the General Dynamics Corporation ("Employer"), a maritime facility adjacent to the navigable waters of the Thames River where the Employer builds, repairs and overhauls submarines. He left the shipyard a few

months later and went to work elsewhere. He returned to the shipyard as a pipefitter in 1971 and 1972, left to work elsewhere, and returned to the shipyard on March 26, 1973 as a pipefitter. In the performance of his duties Claimant daily used air-fed vibratory tools and he worked all over the boats, often in tight and confined spaces, sometimes in awkward positions. He still works at the shipyard and, according to Claimant, he has used pneumatic tools at the shipyard for approximately twenty-nine (29) years. (RX 5)

Claimant began to experience bilateral hand/arm problems with symptoms of numbness and tingling and loss of strength and Claimant was examined on February 17, 1999 by Dr. S. Pearce Browning, III, a specialist whose practice is limited to orthopedics and hands, and the doctor, based on Claimant's history report of using pneumatic tools for twenty-eight (28) years as of that time, reported the existence of a "substantial loss" of grip strength in both hands and recommended additional testing. (CX 2)

Dr. Anthony G. Alessi, a neurologist, performed those tests on March 30, 1999 and the doctor opined that Claimant "is suffering from bilateral median neuropathies consistent with carpal tunnel syndrome." (CX 3)

Dr. Browning next saw Claimant on April 22, 1999, at which time the doctor opined that Claimant's vascular studies, electrophysiologic tests and vascular studies are "positive" and "bad," the doctor remarking, "He has with the exception of the thumb, very flat pulse waves, and they were not able to warm the fingers up enough so they could do a cold challenge test." Dr. Browning further opined that all of those abnormal tests led the doctor to conclude that Claimant's bilateral HAVS could reasonably be rated at fifty (50%) percent of each hand. (CX 2c)

Claimant's medical records reflect that upper arterial studies were conducted by Dr. A. Tramontozi on March 12, 1999. (CX 4)

Dr. William A. Wainright, an orthopedic specialist in hand surgery, examined Claimant on January 24, 2000 at the Employer's request and the doctor, in his three page report (RX 6), concludes as follows:

IMPRESSION: 55 year old man with 32 year work history at Electric Boat. He does have some signs and symptoms compatible with vibratory white finger disease. He does have positive vascular testing. He does have an 8% disability of each hand due to presumed vibratory white finger disease.

In addition, he has a heavy smoking history. The smoking history is about 30 pack years. In my opinion, half of his vascular disease of the hands is due to his heavy smoking.

In addition, he has signs and symptoms compatible with peripheral nerve entrapment syndrome. His neurologic testing is positive for bilateral carpal tunnel syndrome. He does have an additional 4% disability of each hand due to presumed carpal tunnel syndrome.

The patient has reached maximum medical improvement and did so at the time of his rating by Dr. Browning in May of 1999.

He should be restricted from the use of air-powered, vibrating tools because of his positive vascular study.

His above mentioned injuries are more likely than not related to the use of his positive vascular study.

He does have abnormalities in his thyroid profile. This is a pre-existing condition making his current problems materially and substantially worse.

The patient is still employed at Electric Boat, according to the doctor.

On the basis of the totality of this record², I make the following:

Findings of Fact and Conclusions of Law

This Administrative Law Judge, in arriving at a decision in this matter, is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and he is not bound to accept the opinion or theory of any particular medical examiner. **Banks v. Chicago Grain Trimmers Association, Inc.**, 390 U.S. 459 (1968), **reh. denied**, 391 U.S. 929 (1969); **Todd Shipyards v. Donovan**, 300 F.2d 741 (5th Cir. 1962); **Scott v. Tug Mate, Incorporated**, 22 BRBS 164, 165, 167 (1989); **Hite v. Dresser Guiberson Pumping**, 22 BRBS 87, 91 (1989); **Anderson v. Todd Shipyard Corp.**, 22 BRBS 20, 22 (1989); **Hughes v. Bethlehem Steel Corp.**, 17 BRBS 153 (1985); **Seaman v. Jacksonville Shipyard, Inc.**, 14 BRBS 148.9 (1981); **Brandt v. Avondale Shipyards, Inc.**, 8 BRBS 698 (1978); **Sargent v. Matson Terminal, Inc.**, 8 BRBS 564 (1978).

²Claimant, who was present in the courtroom for his hearing, was excused from testifying as the Employer stipulated that his HAVS constituted a work-related injury and as the parties were submitting the issues involved to this Court based upon a stipulated record. (TR 6-7)

The Act provides a presumption that a claim comes within its provisions. **See** 33 U.S.C. §920(a). This Section 20 presumption "applies as much to the nexus between an employee's malady and his employment activities as it does to any other aspect of a claim." **Swinton v. J. Frank Kelly, Inc.**, 554 F.2d 1075 (D.C. Cir. 1976), **cert. denied**, 429 U.S. 820 (1976). Claimant's uncontradicted credible testimony alone may constitute sufficient proof of physical injury. **Golden v. Eller & Co.**, 8 BRBS 846 (1978), **aff'd**, 620 F.2d 71 (5th Cir. 1980); **Hampton v. Bethlehem Steel Corp.**, 24 BRBS 141 (1990); **Anderson v. Todd Shipyards**, *supra*, at 21; **Miranda v. Excavation Construction, Inc.**, 13 BRBS 882 (1981).

However, this statutory presumption does not dispense with the requirement that a claim of injury must be made in the first instance, nor is it a substitute for the testimony necessary to establish a "**prima facie**" case. The Supreme Court has held that "[a] **prima facie** 'claim for compensation,' to which the statutory presumption refers, must at least allege an injury that arose in the course of employment as well as out of employment." **United States Indus./Fed. Sheet Metal, Inc., v. Director, Office of Workers' Compensation Programs, U.S. Dep't of Labor**, 455 U.S. 608, 615 102 S. Ct. 1318, 14 BRBS 631, 633 (CRT) (1982), **rev'g Riley v. U.S. Indus./Fed. Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980).

Moreover, "the mere existence of a physical impairment is plainly insufficient to shift the burden of proof to the employer." **Id.** The presumption, though, is applicable once claimant establishes that he has sustained an injury, *i.e.*, harm to his body. **Preziosi v. Controlled Industries**, 22 BRBS 468, 470 (1989); **Brown v. Pacific Dry Dock Industries**, 22 BRBS 284, 285 (1989); **Trask v. Lockheed Shipbuilding and Construction Company**, 17 BRBS 56, 59 (1985); **Kelaita v. Triple A. Machine Shop**, 13 BRBS 326 (1981).

To establish a **prima facie** claim for compensation, a claimant need not affirmatively establish a connection between work and harm. Rather, a claimant has the burden of establishing only that (1) the claimant sustained physical harm or pain and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused the harm or pain. **Kier v. Bethlehem Steel Corp.**, 16 BRBS 128 (1984); **Kelaita**, *supra*. Once this **prima facie** case is established, a presumption is created under Section 20(a) that the employee's injury or death arose out of employment. To rebut the presumption, the party opposing entitlement must present substantial evidence proving the absence of or severing the connection between such harm and employment or working conditions. **Parsons Corp. of California v. Director, OWCP**, 619 F.2d 38 (9th Cir. 1980); **Butler v. District Parking Management Co.**, 363 F.2d 682 (D.C. Cir. 1966); **Ranks v. Bath Iron Works Corp.**, 22 BRBS 301, 305 (1989); **Kier**, *supra*. Once claimant establishes a physical harm and working conditions which could have caused or aggravated the harm or pain the burden shifts to the employer to establish that claimant's condition was not caused or

aggravated by his employment. **Brown v. Pacific Dry Dock**, 22 BRBS 284 (1989); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). If the presumption is rebutted, it no longer controls and the record as a whole must be evaluated to determine the issue of causation. **Del Vecchio v. Bowers**, 296 U.S. 280 (1935); **Volpe v. Northeast Marine Terminals**, 671 F.2d 697 (2d Cir. 1981); **Holmes v. Universal Maritime Serv. Corp.**, 29 BRBS 18 (1995). In such cases, I must weigh all of the evidence relevant to the causation issue. **Sprague v. Director, OWCP**, 688 F.2d 862 (1st Cir. 1982); **Holmes, supra**; **MacDonald v. Trailer Marine Transport Corp.**, 18 BRBS 259 (1986).

To establish a **prima facie** case for invocation of the Section 20(a) presumption, claimant must prove that (1) he suffered a harm, and (2) an accident occurred or working conditions existed which could have caused the harm. **See, e.g., Noble Drilling Company v. Drake**, 795 F.2d 478, 19 BRBS 6 (CRT) (5th Cir. 1986); **James v. Pate Stevedoring Co.**, 22 BRBS 271 (1989). If claimant's employment aggravates a non-work-related, underlying disease so as to produce incapacitating symptoms, the resulting disability is compensable. **See Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986); **Gardner v. Bath Iron Works Corp.**, 11 BRBS 556 (1979), **aff'd sub nom. Gardner v. Director, OWCP**, 640 F.2d 1385, 13 BRBS 101 (1st Cir. 1981). If employer presents "specific and comprehensive" evidence sufficient to sever the connection between claimant's harm and his employment, the presumption no longer controls, and the issue of causation must be resolved on the whole body of proof. **See, e.g., Leone v. Sealand Terminal Corp.**, 19 BRBS 100 (1986).

The Board has held that credible complaints of subjective symptoms and pain can be sufficient to establish the element of physical harm necessary for a **prima facie** case for Section 20(a) invocation. **See Sylvester v. Bethlehem Steel Corp.**, 14 BRBS 234, 236 (1981), **aff'd**, 681 F.2d 359, 14 BRBS 984 (5th Cir. 1982). Moreover, I may properly rely on Claimant's statements to establish that he experienced a work-related harm, and as it is undisputed that a work accident occurred which could have caused the harm, the Section 20(a) presumption is invoked in this case. **See, e.g., Sinclair v. United Food and Commercial Workers**, 23 BRBS 148, 151 (1989). Moreover, Employer's general contention that the clear weight of the record evidence establishes rebuttal of the pre-presumption is not sufficient to rebut the presumption. **See generally Miffleton v. Briggs Ice Cream Co.**, 12 BRBS 445 (1980).

The presumption of causation can be rebutted only by "substantial evidence to the contrary" offered by the employer. 33 U.S.C. § 920. What this requirement means is that the employer must offer evidence which completely **rules out the** connection between the alleged event and the alleged harm. In **Caudill v. Sea Tac Alaska Shipbuilding**, 25 BRBS 92 (1991), the carrier offered a medical expert who testified that an employment injury did not

"play a significant role" in contributing to the back trouble at issue in this case. The Board held such evidence insufficient as a matter of law to rebut the presumption because the testimony did not completely rule out the role of the employment injury in contributing to the back injury. **See also Cairns v. Matson Terminals, Inc.**, 21 BRBS 299 (1988) (medical expert opinion which did entirely attribute the employee's condition to non-work-related factors was nonetheless insufficient to rebut the presumption where the expert equivocated somewhat on causation elsewhere in his testimony). Where the employer/carrier can offer testimony which completely severs the causal link, the presumption is rebutted. **See Phillips v. Newport News Shipbuilding & Dry Dock Co.**, 22 BRBS 94 (1988) (medical testimony that claimant's pulmonary problems are consistent with cigarette smoking rather than asbestos exposure sufficient to rebut the presumption).

For the most part only medical testimony can rebut the Section 20(a) presumption. **But see Brown v. Pacific Dry Dock**, 22 BRBS 284 (1989) (holding that asbestosis causation was not established where the employer demonstrated that 99% of its asbestos was removed prior to the claimant's employment while the remaining 1% was in an area far removed from the claimant and removed shortly after his employment began). Factual issues come in to play only in the employee's establishment of the **prima facie** elements of harm/possible causation and in the later factual determination once the Section 20(a) presumption passes out of the case.

Once rebutted, the presumption itself passes completely out of the case and the issue of causation is determined by examining the record "as a whole". **Holmes v. Universal Maritime Services Corp.**, 29 BRBS 18 (1995). Prior to 1994, the "true doubt" rule governed the resolution of all evidentiary disputes under the Act; where the evidence was in equipoise, all factual determinations were resolved in favor of the injured employee. **Young & Co. v. Shea**, 397 F.2d 185, 188 (5th Cir. 1968), **cert. denied**, 395 U.S. 920, 89 S. Ct. 1771 (1969). The Supreme Court held in 1994 that the "true doubt" rule violated the Administrative Procedure Act, the general statute governing all administrative bodies. **Director, OWCP v. Greenwich Collieries**, 512 U.S. 267, 114 S. Ct. 2251, 28 BRBS 43 (CRT) (1994). Accordingly, after **Greenwich Collieries** the employee bears the burden of proving causation by a preponderance of the evidence after the presumption is rebutted.

As neither party disputes that the Section 20(a) presumption is invoked, **see Kelaita v. Triple A Machine Shop**, 13 BRBS 326 (1981), the burden shifts to employer to rebut the presumption with substantial evidence which establishes that claimant's employment did not cause, contribute to, or aggravate his condition. **See Peterson v. General Dynamics Corp.**, 25 BRBS 71 (1991), **aff'd sub nom. Insurance Company of North America v. U.S. Dept. of Labor**, 969 F.2d 1400, 26 BRBS 14 (CRT)(2d Cir. 1992), **cert. denied**, 507 U.S.

909, 113 S. Ct. 1264 (1993); **Obert v. John T. Clark and Son of Maryland**, 23 BRBS 157 (1990); **Sam v. Loffland Brothers Co.**, 19 BRBS 228 (1987). The unequivocal testimony of a physician that no relationship exists between an injury and a claimant's employment is sufficient to rebut the presumption. **See Kier v. Bethlehem Steel Corp.**, 16 BRBS 128 (1984). If an employer submits substantial countervailing evidence to sever the connection between the injury and the employment, the Section 20(a) presumption no longer controls and the issue of causation must be resolved on the whole body of proof. **Stevens v. Tacoma Boatbuilding Co.**, 23 BRBS 191 (1990). This Administrative Law Judge, in weighing and evaluating all of the record evidence, may place greater weight on the opinions of the employee's treating physician as opposed to the opinion of an examining or consulting physician. In this regard, **see Pietrunti v. Director, OWCP**, 119 F.3d 1035, 31 BRBS 84 (CRT)(2d Cir. 1997). **See also Sir Gean Amos v. Director, OWCP**, 153 F.3d 1051, **amended**, 164 F.3d 480, 32 BRBS 144 (CRT)(9th Cir. 1999).

In the case **sub judice**, Claimant alleges that the harm to his bodily frame, **i.e.**, his bilateral hand/arm vibration syndrome (HAVS) resulted from working conditions or resulted from at the Employer's shipyard. The Employer has introduced no evidence severing the connection between such harm and Claimant's maritime employment. Thus, Claimant has established a **prima facie** claim that such harm is a work-related injury, as shall now be discussed.

Injury

The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury. **See 33 U.S.C. §902(2); U.S. Industries/Federal Sheet Metal, Inc., et al., v. Director, Office of Workers Compensation Programs, U.S. Department of Labor**, 455 U.S. 608, 102 S.Ct. 1312 (1982), **rev'g Riley v. U.S. Industries/Federal Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). A work-related aggravation of a pre-existing condition is an injury pursuant to Section 2(2) of the Act. **Gardner v. Bath Iron Works Corporation**, 11 BRBS 556 (1979), **aff'd sub nom. Gardner v. Director, OWCP**, 640 F.2d 1385 (1st Cir. 1981); **Preziosi v. Controlled Industries**, 22 BRBS 468 (1989); **Januszewicz v. Sun Shipbuilding and Dry Dock Company**, 22 BRBS 376 (1989) (**Decision and Order on Remand**); **Johnson v. Ingalls Shipbuilding**, 22 BRBS 160 (1989); **Madrid v. Coast Marine Construction**, 22 BRBS 148 (1989). Moreover, the employment-related injury need not be the sole cause, or primary factor, in a disability for compensation purposes. Rather, if an employment-related injury contributes to, combines with or aggravates a pre-existing disease or underlying condition, the entire resultant disability is compensable. **Strachan Shipping v. Nash**, 782 F.2d 513 (5th Cir. 1986);

Independent Stevedore Co. v. O'Leary, 357 F.2d 812 (9th Cir. 1966); **Kooley v. Marine Industries Northwest**, 22 BRBS 142 (1989); **Mijangos v. Avondale Shipyards, Inc.**, 19 BRBS 15 (1986); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). Also, when claimant sustains an injury at work which is followed by the occurrence of a subsequent injury or aggravation outside work, employer is liable for the entire disability if that subsequent injury is the natural and unavoidable consequence or result of the initial work injury. **Bludworth Shipyard, Inc. v. Lira**, 700 F.2d 1046 (5th Cir. 1983); **Mijangos, supra**; **Hicks v. Pacific Marine & Supply Co.**, 14 BRBS 549 (1981). The term injury includes the aggravation of a pre-existing non-work-related condition or the combination of work- and non-work-related conditions. **Lopez v. Southern Stevedores**, 23 BRBS 295 (1990); **Care v. WMATA**, 21 BRBS 248 (1988).

In occupational disease cases, there is no "injury" until the accumulated effects of the harmful substance manifest themselves and claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between the employment, the disease and the death or disability. **Travelers Insurance Co. v. Cardillo**, 225 F.2d 137 (2d Cir. 1955), **cert. denied**, 350 U.S. 913 (1955). **Thorud v. Brady-Hamilton Stevedore Company, et al.**, 18 BRBS 232 (1987); **Geisler v. Columbia Asbestos, Inc.**, 14 BRBS 794 (1981). Nor does the Act require that the injury be traceable to a definite time. The fact that claimant's injury occurred gradually over a period of time as a result of continuing exposure to conditions of employment is no bar to a finding of an injury within the meaning of the Act. **Bath Iron Works Corp. v. White**, 584 F.2d 569 (1st Cir. 1978).

This closed record conclusively establishes, and I so find and conclude, that Claimant's daily use of air-fed vibratory tools for twenty-nine (29) years at the Employer's shipyard has resulted in bilateral hand/arm vibration syndrome (HAVS) or bilateral carpal tunnel syndrome, that the date of injury is April 20, 1999 (CX 2d, CX 2c), that the Employer had notice of such injury by means of a protective filing of a claim for benefits, Form LS-203 dated October 13, 1998 (CX 1b), that the Employer has treated the condition as non-industrial until just before the hearing and timely controverted his entitlement to benefits. (RX 2) In fact, the sole issue is the nature and extent of Claimant's acknowledged disability, an issue I shall now resolve.

Nature and Extent of Disability

It is axiomatic that disability under the Act is an economic concept based upon a medical foundation. **Quick v. Martin**, 397 F.2d 644 (D.C. Cir. 1968); **Owens v. Traynor**, 274 F. Supp. 770 (D.Md. 1967), **aff'd**, 396 F.2d 783 (4th Cir. 1968), **cert. denied**, 393 U.S. 962 (1968). Thus, the extent of disability cannot be measured by

physical or medical condition alone. **Nardella v. Campbell Machine, Inc.**, 525 F.2d 46 (9th Cir. 1975). Consideration must be given to claimant's age, education, industrial history and the availability of work he can perform after the injury. **American Mutual Insurance Company of Boston v. Jones**, 426 F.2d 1263 (D.C. Cir. 1970). Even a relatively minor injury may lead to a finding of total disability if it prevents the employee from engaging in the only type of gainful employment for which he is qualified. (**Id.** at 1266)

Claimant has the burden of proving the nature and extent of his disability without the benefit of the Section 20 presumption. **Carroll v. Hanover Bridge Marina**, 17 BRBS 176 (1985); **Hunigman v. Sun Shipbuilding & Dry Dock Co.**, 8 BRBS 141 (1978). However, once claimant has established that he is unable to return to his former employment because of a work-related injury or occupational disease, the burden shifts to the employer to demonstrate the availability of suitable alternate employment or realistic job opportunities which claimant is capable of performing and which he could secure if he diligently tried. **New Orleans (Gulfwide) Stevedores v. Turner**, 661 F.2d 1031 (5th Cir. 1981); **Air America v. Director**, 597 F.2d 773 (1st Cir. 1979); **American Stevedores, Inc. v. Salzano**, 538 F.2d 933 (2d Cir. 1976); **Preziosi v. Controlled Industries**, 22 BRBS 468, 471 (1989); **Elliott v. C & P Telephone Co.**, 16 BRBS 89 (1984). While Claimant generally need not show that he has tried to obtain employment, **Shell v. Teledyne Movable Offshore, Inc.**, 14 BRBS 585 (1981), he bears the burden of demonstrating his willingness to work, **Trans-State Dredging v. Benefits Review Board**, 731 F.2d 199 (4th Cir. 1984), once suitable alternate employment is shown. **Wilson v. Dravo Corporation**, 22 BRBS 463, 466 (1989); **Royce v. Elrich Construction Company**, 17 BRBS 156 (1985).

As of the date of the hearing, Claimant was still working at the shipyard and has not sustained a loss of wage-earning capacity.

Sections 8(a) and (b) and Total Disability

A worker entitled to permanent partial disability for an injury arising under the schedule may be entitled to greater compensation under Sections 8(a) and (b) by a showing that he/she is totally disabled. **Potomac Electric Power Co. v. Director**, 449 U.S. 268 (1980) (herein "**Pepco**"). **Pepco**, 449 U.S. at 277, n.17; **Davenport v. Daytona Marine and Boat Works**, 16 BRBS 1969, 199 (1984). However, unless the worker is totally disabled, he is limited to the compensation provided by the appropriate schedule provision. **Winston v. Ingalls Shipbuilding, Inc.**, 16 BRBS 168, 172 (1984).

Two separate scheduled disabilities must be compensated under the schedules in the absence of a showing of a total disability,

and claimant is precluded from (1) establishing a greater loss of wage-earning capacity than the presumed by the Act or (2) receiving compensation benefits under Section 8(c)(21). Since Claimant suffered injuries to more than one member covered by the schedule, he must be compensated under the applicable portion of Sections 8(c)(1) - (20), with the awards running consecutively. **Potomac Electric Power Co. v. Director, OWCP**, 449 U.S. 268 (1980). In **Brandt v. Avondale Shipyards, Inc.**, 16 BRBS 120 (1984), the Board held that claimant was entitled to two separate awards under the schedule for his work-related injuries to his right knee and left index finger.

Claimant's injury has become permanent. A permanent disability is one which has continued for a lengthy period and is of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. **General Dynamics Corporation v. Benefits Review Board**, 565 F.2d 208 (2d Cir. 1977); **Watson v. Gulf Stevedore Corp.**, 400 F.2d 649 (5th Cir. 1968), cert. denied, 394 U.S. 976 (1969); **Seidel v. General Dynamics Corp.**, 22 BRBS 403, 407 (1989); **Stevens v. Lockheed Shipbuilding Co.**, 22 BRBS 155, 157 (1989); **Trask v. Lockheed Shipbuilding and Construction Company**, 17 BRBS 56 (1985); **Mason v. Bender Welding & Machine Co.**, 16 BRBS 307, 309 (1984). The traditional approach for determining whether an injury is permanent or temporary is to ascertain the date of "maximum medical improvement." The determination of when maximum medical improvement is reached so that claimant's disability may be said to be permanent is primarily a question of fact based on medical evidence. **Lozada v. Director, OWCP**, 903 F.2d 168, 23 BRBS 78 (CRT) (2d Cir. 1990); **Hite v. Dresser Guiberson Pumping**, 22 BRBS 87, 91 (1989); **Care v. Washington Metropolitan Area Transit Authority**, 21 BRBS 248 (1988); **Wayland v. Moore Dry Dock**, 21 BRBS 177 (1988); **Eckley v. Fibrex and Shipping Company**, 21 BRBS 120 (1988); **Williams v. General Dynamics Corp.**, 10 BRBS 915 (1979).

The Benefits Review Board has held that a determination that claimant's disability is temporary or permanent may not be based on a prognosis that claimant's condition may improve and become stationary at some future time. **Meecke v. I.S.O. Personnel Support Department**, 10 BRBS 670 (1979). The Board has also held that a disability need not be "eternal or everlasting" to be permanent and the possibility of a favorable change does not foreclose a finding of permanent disability. **Exxon Corporation v. White**, 617 F.2d 292 (5th Cir. 1980), aff'g 9 BRBS 138 (1978). Such future changes may be considered in a Section 22 modification proceeding when and if they occur. **Fleetwood v. Newport News Shipbuilding and Dry Dock Company**, 16 BRBS 282 (1984), aff'd, 776 F.2d 1225, 18 BRBS 12 (CRT) (4th Cir. 1985).

Permanent disability has been found where little hope exists of eventual recovery, **Air America, Inc. v. Director, OWCP**, 597 F.2d

773 (1st Cir. 1979), where claimant has already undergone a large number of treatments over a long period of time, **Meecke v. I.S.O. Personnel Support Department**, 10 BRBS 670 (1979), even though there is the possibility of favorable change from recommended surgery, and where work within claimant's work restrictions is not available, **Bell v. Volpe/Head Construction Co.**, 11 BRBS 377 (1979), and on the basis of claimant's credible complaints of pain alone. **Eller and Co. v. Golden**, 620 F.2d 71 (5th Cir. 1980). Furthermore, there is no requirement in the Act that medical testimony be introduced, **Ballard v. Newport News Shipbuilding & Dry Dock Co.**, 8 BRBS 676 (1978); **Ruiz v. Universal Maritime Service Corp.**, 8 BRBS 451 (1978), or that claimant be bedridden to be totally disabled, **Watson v. Gulf Stevedore Corp.**, 400 F.2d 649 (5th Cir. 1968). Moreover, the burden of proof in a temporary total case is the same as in a permanent total case. **Bell, supra**. See also **Walker v. AAF Exchange Service**, 5 BRBS 500 (1977); **Swan v. George Hyman Construction Corp.**, 3 BRBS 490 (1976). There is no requirement that claimant undergo vocational rehabilitation testing prior to a finding of permanent total disability, **Mendez v. Bernuth Marine Shipping, Inc.**, 11 BRBS 21 (1979); **Perry v. Stan Flowers Company**, 8 BRBS 533 (1978), and an award of permanent total disability may be modified based on a change of condition. **Watson v. Gulf Stevedore Corp., supra**.

An employee is considered permanently disabled if he has any residual disability after reaching maximum medical improvement. **Lozada v. General Dynamics Corp.**, 903 F.2d 168, 23 BRBS 78 (CRT) (2d Cir. 1990); **Sinclair v. United Food & Commercial Workers**, 13 BRBS 148 (1989); **Trask v. Lockheed Shipbuilding & Construction Co.**, 17 BRBS 56 (1985). A condition is permanent if claimant is no longer undergoing treatment with a view towards improving his condition, **Leech v. Service Engineering Co.**, 15 BRBS 18 (1982), or if his condition has stabilized. **Lusby v. Washington Metropolitan Area Transit Authority**, 13 BRBS 446 (1981).

On the basis of the totality of the record, I find and conclude that Claimant reached maximum medical improvement on April 20, 1999 and that he has been permanently and partially disabled from that date, according to the well-reasoned opinion of Dr. Browning, at which time he rated the extent of Claimant's bilateral impairment of the upper extremities. (CX 2c)

The parties deposed Dr. Browning on January 10, 2000 (CX 5) and the doctor, who is one of the pre-eminent specialists in the State of Connecticut and whose medical practice is limited to orthopedics and to the hands for a total of thirty-eight (38) years and who, unfortunately, is in the process of a gradual retirement from the profession, testified that he has evaluated over four hundred (400) HAVS cases in the course of his practice. Dr. Browning reiterated his opinions that Claimant's diagnostic tests were "(v)ery abnormal", that the fingers of his hands were so cold

that "they were not able to get this gentleman's fingers warm enough to do the cold stress study," that the tests show "ambl evidence of vascular abnormality," that "he had a very bad vascular problem and that was why the (doctor gave the) ratings" that he expressed with reference to Claimant's impairment. Dr. Browning agreed with Dr. Alessi's opinions that the findings he (Dr. Alessi) observed were "consistent with bilateral carpal tunnel syndrome" and he vigorously disagreed with Dr. Jones, the Employer's initial medical expert (whose report was not offered herein), who stated in a letter to James Rondeau the workers' compensation adjuster, that Claimant's "EMG tests were all normal." (CX 5 at 3-9)

Dr. Browning then gave a detailed explanation as to the essential components and factors that he considered in determining that Claimant's work-related injury had resulted in a fifty (50%) percent permanent partial impairment (CX 5 at 10-22) and the doctors opinions withstood intense cross-examination by Employer's counsel. (CX 5 at 22-32) Dr. Browning essentially testified that he used a combination of the AMA **Guidelines For the Evaluation of Permanent Impairment**, Fourth Edition, for the pertinent components, as well as the so-called Stockholm Rating System because the **Guides** do not take into account vascular disease and a vasospastic condition such as Claimant experiences. Dr. Browning prefers to use the Stockholm Rating System in this case because that "was a system which was devised in Sweden principally for HAVS resulting from the use of chainsaws, which were the vibrating tools." (CX 5 at 14-16, 33-35)

Dr. William A. Wainright, an orthopedic surgeon, is the Employer's medical expert and the doctor testified at his February 29, 2000 deposition (RX 10) that Claimant's maritime employment had resulted in "vibratory white finger disease," that "he had an eight percent disability of each hand due to presumed vibratory white finger disease," that "he had signs and symptoms compatible with peripheral nerve entrapment syndrome," that "his nerve conduction studies were positive studies were positive for bilateral carpal tunnel" and that he "had an additional four percent disability of each hand due to presumed carpal tunnel syndrome." (RX 10 at 3-8) Dr. Wainright disagreed with Dr. Browning's impairment ratings and the methodology used by the doctor in interpreting the values of the diagnostic tests. (RX 10 at 9-15)

Dr. Wainright examined Claimant just that one time and, in response to intense cross-examination, the doctor admitted that he does not perform some of the diagnostic tests utilized by Dr. Browning to evaluate fully the nature and etiology of the Claimant's bilateral hand/arms symptoms. The doctor also admitted that he was asked by Employer's counsel to use the AMA **Guides** in evaluating Claimant's impairment, the doctor candidly admitting that the **Guides** do not really fit those situations where the employee has used air-fed, vibratory tools in his employment. (RX

10 at 15-38) Counsel's valiant attempt to rehabilitate Dr. Wainright's testimony (RX 10 at 38-42) fails because he was unable to negate the doctor's candid admissions.

As can be seen from the above extensive summary of the medical evidence, this proceeding essentially boils down to the classic battle of the medical experts and a dispute as to whether Claimant's accepted repetitive/cumulative trauma injury has resulted in a fifty (50%) percent permanent partial impairment of each arm, according to Claimant's treating orthopedic physician, Dr. Browning (CX 2), or a twelve (12%) percent impairment of each hand, according to the Employer's medical expert, Dr. Wainright. (RX 10)

As noted, Dr. Browning would not rely solely upon the **Guides** to rate Claimant's bilateral impairment to his hands because, in his opinion, they do not adequately reflect the impact that this injury has had on Claimant's residual work capacity and his daily living **because the Guides do not apply to cumulative trauma injuries** and do not adequately cover his daily chronic pain.

On the basis of the totality of this closed record, this Administrative Law Judge, having reviewed the entire record, finds and concludes that the opinion of Dr. Browning is well-reasoned and well-documented and best effectuates the purposes of this beneficent and humanitarian statute.

Initially, I note that the Longshore Act does not require that permanent partial disability be based on the **AMA Guides**, except in two circumstances: hearing loss and occupational disease claims by retirees. 33 U.S.C. §902(10) 908(c)(13)(E),(c)(23) The Benefits Review Board has explicitly held that an Administrative Law Judge is not required to use the **AMA Guides**. **Mazze v. Frank J. Holleran, Inc.**, 9 BRBS 1053 (1978). Indeed, the term "permanent impairment," which is the central concept in the **Guides'** rating system, is not even used by the Longshore Act. Rather, the Act speaks in terms of awards for permanent partial "disability" and provides for a proportionate award when there has been a partial loss or partial loss of use. The broader language has led the Benefits Review Board to acknowledge that an Administrative Law Judge has the authority to look at all of the evidence concerning the impact that an injury has had on an individual's earning capacity and has accorded Administrative Law Judges significant discretion in determining the proper percentage for loss of use. **Michael v. Sun Shipbuilding & Drydock Co.**, 7 BRBS 5 (1977).

Moreover, the Board has also recognized the effect that chronic pain plays in an individual who has sustained a so-called schedule injury as a result of a covered work-related injury and, in appropriate factual circumstances, has permitted an ongoing award of permanent partial disability benefits, pursuant to Section

8(c)(21) of the Act. In this regard, **see Frye v. PEPCO**, 21 BRBS 194 (1988).³

It is apparent that both Dr. Browning and Dr. Wainright recognize the limitations of the **Guides** as they apply to cumulative trauma types of injuries, and injuries where chronic pain significantly limits the individual's work capacity. The difference between the two opinions, though, is that Dr. Wainright leaves the discussion there. He concedes that he did not, in his numerical ratings, reflect the significant pain-related disability that he found when he evaluated Claimant. Dr. Browning's rating, which is the higher rating, explicitly reflects the impact of the injury as a whole on his long-term work capacity and his daily living. Consequently, it is the better and more reliable evaluation of the impact of the injury, and I so find and conclude.

Dr. Browning has been Claimant's treating orthopedist since at least February 17, 1999 (CX 2), has followed a disciplined approach to impairment⁴ evaluation and has provided an impairment rating which takes into account the impact that Claimant's daily chronic pain and his inability to perform his regular work at the shipyard. Thus, Dr. Browning's opinion is the more well-reasoned and the more well-documented in this closed record.

I cannot accept the Employer's essential thesis that I should apply the **Guides** herein because they are an **objective** method of evaluating permanent impairment. I disagree because it is that **objective** aspect which does not, and cannot take into account, Claimant's daily chronic pain, a condition which affects his daily living and his residual work capacity.

While I am most impressed with the professional qualifications of Dr. Wainright, and I have accepted and credited his opinions in other matters over which I have presided, I simply cannot accept his opinions in this case for the foregoing reasons. Furthermore, this Administrative Law Judge, in his discretion, may give greater weight to the opinions of the Claimant's treating physician, and I do so in this case to effectuate the purposes of the Act because, in my judgment, the automatic application, or by rote, if you will,

³ See also **Bass v. Broadway Maintenance**, 28 BRBS 11, 16-17 (1994).

⁴ **Frye** is being cited herein only with reference to the added impairment being added to Claimant's daily activities due to his chronic daily pain. There is no Section 8(c)(21) claim herein, and this closed record does not establish, at this time, a loss of wage-earning capacity.

of the **Guides** will do a manifest injustice to the Claimant. In this regard, **see Amos v. Director, OWCP**, 153 F.3d 1051, (9th Cir. 1998), **amended**, 164 F.3d 480, 32 BRBS 144 (9th Cir. 1999); **see also** 153 F.3d 1051 (9th Cir. 1998); **Pietrunti v. Director, OWCP**, 119 F.3d 1035, 31 BRBS 84 (CRT)(2d Cir. 1997).

Accordingly, I find and conclude that Claimant's disability can be reasonably rated at fifty (50%) percent permanent partial impairment of each hand, pursuant to Section 8(c)(3) of the Act.

Medical Expenses

An Employer found liable for the payment of compensation is, pursuant to Section 7(a) of the Act, responsible for those medical expenses reasonably and necessarily incurred as a result of a work-related injury. **Perez v. Sea-Land Services, Inc.**, 8 BRBS 130 (1978). The test is whether or not the treatment is recognized as appropriate by the medical profession for the care and treatment of the injury. **Colburn v. General Dynamics Corp.**, 21 BRBS 219, 22 (1988); **Barbour v. Woodward & Lothrop, Inc.**, 16 BRBS 300 (1984). Entitlement to medical services is never time-barred where a disability is related to a compensable injury. **Addison v. Ryan-Walsh Stevedoring Company**, 22 BRBS 32, 36 (1989); **Mayfield v. Atlantic & Gulf Stevedores**, 16 BRBS 228 (1984); **Dean v. Marine Terminals Corp.**, 7 BRBS 234 (1977). Furthermore, an employee's right to select his own physician, pursuant to Section 7(b), is well settled. **Bulone v. Universal Terminal and Stevedore Corp.**, 8 BRBS 515 (1978). Claimant is also entitled to reimbursement for reasonable travel expenses in seeking medical care and treatment for his work-related injury. **Tough v. General Dynamics Corporation**, 22 BRBS 356 (1989); **Gilliam v. The Western Union Telegraph Co.**, 8 BRBS 278 (1978).

In **Shahady v. Atlas Tile & Marble**, 13 BRBS 1007 (1981), **rev'd on other grounds**, 682 F.2d 968 (D.C. Cir. 1982), **cert. denied**, 459 U.S. 1146, 103 S.Ct. 786 (1983), the Benefits Review Board held that a claimant's entitlement to an initial free choice of a physician under Section 7(b) does not negate the requirement under Section 7(d) that claimant obtain employer's authorization prior to obtaining medical services. **Banks v. Bath Iron Works Corp.**, 22 BRBS 301, 307, 308 (1989); **Jackson v. Ingalls Shipbuilding Division, Litton Systems, Inc.**, 15 BRBS 299 (1983); **Beynum v. Washington Metropolitan Area Transit Authority**, 14 BRBS 956 (1982). However, where a claimant has been refused treatment by the employer, he need only establish that the treatment he subsequently procures on his own initiative was necessary in order to be entitled to such treatment at the employer's expense. **Atlantic & Gulf Stevedores, Inc. v. Neuman**, 440 F.2d 908 (5th Cir. 1971); **Matthews v. Jeffboat, Inc.**, 18 BRBS at 189 (1986).

An employer's physician's determination that Claimant is fully recovered is tantamount to a refusal to provide treatment. **Slattery Associates, Inc. v. Lloyd**, 725 F.2d 780 (D.C. Cir. 1984); **Walker v. AAF Exchange Service**, 5 BRBS 500 (1977). All necessary medical expenses subsequent to employer's refusal to authorize needed care, including surgical costs and the physician's fee, are recoverable. **Roger's Terminal and Shipping Corporation v. Director, OWCP**, 784 F.2d 687 (5th Cir. 1986); **Anderson v. Todd Shipyards Corp.**, 22 BRBS 20 (1989); **Ballesteros v. Willamette Western Corp.**, 20 BRBS 184 (1988).

Section 7(d) requires that an attending physician file the appropriate report within ten days of the examination. Unless such failure is excused by the fact-finder for good cause shown in accordance with Section 7(d), claimant may not recover medical costs incurred. **Betz v. Arthur Snowden Company**, 14 BRBS 805 (1981). **See also** 20 C.F.R. §702.422. However, the employer must demonstrate actual prejudice by late delivery of the physician's report. **Roger's Terminal, supra**.

It is well-settled that the Act does not require that an injury be disabling for a claimant to be entitled to medical expenses; it only requires that the injury be work related. **Romeike v. Kaiser Shipyards**, 22 BRBS 57 (1989); **Winston v. Ingalls Shipbuilding**, 16 BRBS 168 (1984); **Jackson v. Ingalls Shipbuilding**, 15 BRBS 299 (1983).

On the basis of the totality of the record, I find and conclude that Claimant has shown good cause, pursuant to Section 7(d). Claimant advised the Employer of his work-related injury on or about October 13, 1998 and requested appropriate medical care and treatment (CX 1b). However, the Employer did not accept the claim and did not authorize such medical care. Thus, any failure by Claimant to file timely the physician's report is excused for good cause as a futile act and in the interests of justice as the Employer refused to accept the claim.

However, as noted above, the Employer did not accept the compensability of this claim until January 21, 2000, four days before the hearing. (RX 3)

Accordingly, the Employer is responsible for the reasonable and necessary medical care and treatment in the diagnosis, evaluation and treatment of Claimant's HAVS, subject to the provisions of Section 7 of the Act.

Interest

Although not specifically authorized in the Act, it has been accepted practice that interest at the rate of six (6) percent per annum is assessed on all past due compensation payments. **Avallone v. Todd Shipyards Corp.**, 10 BRBS 724 (1978). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to ensure that the employee receives the full amount of compensation due. **Watkins v. Newport News Shipbuilding & Dry Dock Co.**, 8 BRBS 556 (1978), **aff'd in pertinent part and rev'd on other grounds sub nom. Newport News v. Director, OWCP**, 594 F.2d 986 (4th Cir. 1979); **Santos v. General Dynamics Corp.**, 22 BRBS 226 (1989); **Adams v. Newport News Shipbuilding**, 22 BRBS 78 (1989); **Smith v. Ingalls Shipbuilding**, 22 BRBS 26, 50 (1989); **Caudill v. Sea Tac Alaska Shipbuilding**, 22 BRBS 10 (1988); **Perry v. Carolina Shipping**, 20 BRBS 90 (1987); **Hoey v. General Dynamics Corp.**, 17 BRBS 229 (1985). The Board concluded that inflationary trends in our economy have rendered a fixed six percent rate no longer appropriate to further the purpose of making claimant whole, and held that ". . . the fixed six percent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. §1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills" **Grant v. Portland Stevedoring Company**, 16 BRBS 267, 270 (1984), **modified on reconsideration**, 17 BRBS 20 (1985). Section 2(m) of Pub. L. 97-258 provided that the above provision would become effective October 1, 1982. This Order incorporates by reference this statute and provides for its specific administrative application by the District Director. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

Section 14(e)

Claimant is not entitled to an award of additional compensation, pursuant to the provisions of Section 14(e), as the timely controverted Claimant's entitlement to benefits. (RX 2) **Ramos v. Universal Dredging Corporation**, 15 BRBS 140, 145 (1982); **Garner v. Olin Corp.**, 11 BRBS 502, 506 (1979).

Attorney's Fee

Claimant's attorney, having successfully prosecuted this matter, is entitled to a fee assessed against the Employer as a self-insurer. Claimant's attorney shall file a fee application concerning services rendered and costs incurred in representing Claimant after June 30, 1999, the date of the informal conference. Services rendered prior to this date should be submitted to the District Director for her consideration. The fee petition shall be

filed within thirty (30) days of receipt of this decision and the Employer shall have ten (10) days to file a response.

ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I issue the following compensation order. The specific dollar computations of the compensation award shall be administratively performed by the District Director.

It is therefore **ORDERED** that:

1. The Employer as a self-insurer shall pay to Claimant compensation for his fifty (50%) percent permanent partial disability of the each hand, based upon his average weekly wage of \$954.48, such compensation to be computed in accordance with Section 8(c)(3) of the Act and shall begin on April 20, 1999, the date on which Dr. Browning rated Claimant's bilateral impairment.

2. The Employer shall receive credit for all amounts of compensation previously paid to the Claimant as a result of his April 20, 1999 injury.

3. Interest shall be paid by the Employer on all accrued benefits at the T-bill rate applicable under 28 U.S.C. §1961 (1982), computed from the date each payment was originally due until paid. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

4. The Employer shall furnish such reasonable, appropriate and necessary medical care and treatment as the Claimant's work-related injuries referenced herein may require on and after February 17, 1999 at which time he saw Dr. Browning for the first time, subject to the provisions of Section 7 of the Act.

5. Claimant's attorney shall file, within thirty (30) days of receipt of this Decision and Order, a fully supported and fully itemized fee petition, sending a copy thereof to Employer's counsel who shall then have ten (10) days to comment thereon. This Court has jurisdiction over those services rendered and costs incurred after the informal conference on June 30, 1999.

DAVID W. DI NARDI
Administrative Law Judge

Dated:
Boston, Massachusetts
DWD:jl